BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's	)	
Regulatory Policies Governing	)	IB Docket No. 95-41
Domestic Fixed Satellites and	)	
Separate International Satellite	)	
Systems	)	

REPLY COMMENTS OF THE MOTION PICTURE ASSOCIATION OF AMERICA, INC.

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June 23, 1995

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To: The Commission

REPLY COMMENTS OF THE MOTION PICTURE ASSOCIATION OF AMERICA, INC.

1. Having filed opening Comments on June 8, 1995 in this proceeding, the Motion Picture Association of America, Inc. ("MPAA")[1/], by its attorneys, submits these Reply Comments with respect to certain aspects of the opening comments of other parties.

2. In opening Comments MPAA supported in principle the proposed liberalization of restrictions upon domestic satellite provision of transborder services and separate system provision of services domestically. MPAA views these steps as in the public interest because they are likely to increase the free and

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1/ MPAA's member companies include Buena Vista Pictures Distribution, Inc.; Sony Pictures Entertainment Inc.; Metro-Goldwyn-Mayer Inc.; Paramount Pictures Corporation; Twentieth Century Fox Film Corporation; Universal Studios, Inc.; Warner Bros., a Division of Time Warner Entertainment Company, L.P.; and Turner Pictures.

legitimate flow of programming from producers to viewers, affording both greater choice, and encouraging open markets. MPAA also flagged for the Commission the potential unwanted side effect of the proposals to increase the already serious unauthorized use of satellite-delivered U.S. program product abroad. To address this significant problem, MPAA urged the Commission to take a series of simple steps that are within the Commission's jurisdiction and responsibilities, and which would deter the abuse of FCC licenses as cover for illegal reception and retransmission of U.S. programming.

3. In addition to the multiple bases articulated by MPAA for such steps by the Commission, Capital Cities/ABC, Inc. ("Capital Cities"), in its "Additional Comments" filed June 8, 1995, describes an existing loophole related to the compulsory cable copyright license of Section 111 of the Copyright Act of 1976.[2/] MPAA supports, and amplifies briefly here, this concern.

4. Section 111 of the Copyright Act provides a mechanism for copyright owners to be compensated for the use, in the United States, of their copyrighted works in broadcast signals retransmitted by cable television systems.[3/] Because this mechanism exists, Section 111(a)(3) exempts from liability for

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2/ Additional Comments of Capital Cities at 2-4 (filed June 8, 1995); 17 U.S.C. § 111.

3/ Such retransmissions are MPAA's main, but not exclusive, concern in this proceeding.

copyright infringement a carrier's purely passive retransmission of broadcast signals containing copyrighted program material.[4/] Section 111(a)(3) expressly provides, however, that the exemption from liability applies only to secondary transmissions of the carrier, and does "not exempt from liability the activities of others with respect to their own primary or secondary transmissions."[5/] In other words, a carrier, such as an FCC-licensed satellite provider, is exempt from copyright liability, which is imposed in other ways by the compulsory license. But a carrier's customer (i.e., a cable operator), or someone who intercepts the carrier's transmission and uses or distributes it without authority, is liable for infringement.

5. Section 111 applies, of course, only within the U.S., not extraterritorially. If adopted, the proposals of the Notice in this proceeding are likely to increase the number of domestic satellite systems providing transborder service, and the number of separate systems providing domestic service. All systems will be able to provide both types of service on a co-primary basis. An unintended likely side effect is the creation of more than the already problematic number of satellite footprints which cover the U.S. but are also large enough to enable programming distribution in the Caribbean and Latin America (the "spillover"

4/ 17 U.S.C. § 111(a)(3).

5/ Id.

problem). Notwithstanding this technical ability to exceed U.S. borders, authority to provide programming outside the U.S. may not exist[6/] and, as MPAA has pointed out, is not automatic.[7/] In addition, the proposals are likely to increase the intentional provision of U.S. programming to foreign points, where unauthorized interception cannot be addressed under Section 111 and adequate protection may be unavailable.

6. These existing "loopholes" are additional, compelling reasons for the Commission to factor in the concerns of U.S. program owners in its implementation of the proposals of the Notice through its own licensing process.[8/] The Commission cannot, and should not attempt to, solve the copyright problem completely. The Commission can and must, however, act within its existing authority, obligations and precedent to deter as much as possible the illegitimate use of U.S. program product under color of, or as a result of, FCC fixed-satellite authorizations. In light of the "loopholes" and Section 111(a)(3) in particular, the Commission should assure that U.S.-licensed carriers act responsibly with respect to their own activities, and that they

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6/ Capital Cities Additional Comments at 3.

7/ Comments of MPAA at 6 (filed June 8, 1995).

8/ Home Box Office ("HBO") also notes the piracy problem and potential in its opening comments (for example, "... certain proposals [in the Notice] may adversely encourage the piracy of programming services outside the territories where the distributors are authorized to sell." HBO Comments at 16.).

have an FCC-required role with respect to recipients, intended and unintended, of their satellite transmissions.

7. In opening Comments MPAA suggests specific ways to do that, including the conditioning of authorizations upon copyright compliance and deterrence of misuse of U.S. programming. Both MPAA and Capital Cities cited language already used in satellite authorizations indicating that FCC authority does not include the right to distribute programming "where the appropriate copyright clearances have not been obtained or where the U.S. government [such as U.S.T.R.] has determined that appropriate copyright protection does not exist."[9/] In addition, MPAA recommends that conditioning language be adapted, for use in terrestrial and space segment authorizations, from a condition currently used in earth station authorizations, to the effect that:

> These facilities shall be used only for the transmission [or reception] of programming material that the licensee has been authorized to transmit [or receive] and use by the owner of the programming material.[10/]

8. MPAA also recommended that applicants be required to certify that they will seek to prevent the unauthorized use of programming they distribute. MPAA endorses, as effective corollaries to this step, the Capital Cities suggestions that operators (1) obtain, and maintain on file, representations from

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9/ MPAA at 6; Capital Cities Additional Comments at 4.

10/ Report No. DS-1544: Satellite Communications Services, Public Notice released June 21, 1995.

their customers that the originator of any domestic signal carried by a programming service customer of the satellite operator authorizes the foreign distribution of that signal, and (2) that an operator obtain and maintain on file a representation from its customers, such as programming services, that appropriate copyright clearances have been obtained from all of the customers' authorized receive points.[11/] At a minimum, the Commission should require its licensees to make publicly available the identity of customers of signals in foreign countries, to facilitate monitoring and enforcement to promote legitimate use of U.S. product there.

9. MPAA also endorses the Capital Cities suggestion that the Commission should order satellite operators to show cause why they should not be required to cease carrying transmissions that appear to violate Section 705 of the Communications Act of 1934, as amended, 47 U.S.C. § 605, or copyright provisions.[12/]

10. Concerning FCC licensing of foreign entities to provide domestic service, several commenters, such as AT&T, make the point in opening comments that foreign entry to the U.S. market should be tied to an "effective opportunity" for U.S. interests to compete in the applicant's home market.[13/] MPAA, in its

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11/ Capital Cities Additional Comments at 6.

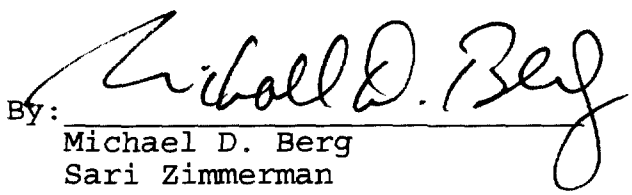
12/ Id.

13/ Comments of AT&T at 16-17 (filed June 8, 1995).

comments in the Commission's market entry rulemaking proceeding, advocated taking market openness into account as part of the FCC's domestic licensing responsibilities. MPAA also proposed including content-related issues, such as the extent to which foreign markets are open to the provision of U.S. video and audio programming, in FCC authorizations of foreign entry to the U.S. market.[14/] In the instant proceeding, it is important that this market openness be defined to encompass both market access (including the absence of quota restrictions) for U.S. programming, and adequate protection for U.S. programming product. Competition cannot be fair or effective if the unauthorized use of product is not deterred and remedied.

Respectfully submitted,

MOTION PICTURE ASSOCIATION OF AMERICA, INC.

By: 

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14/ Comments of MPAA in IB Docket No. 95-22 at 3 (filed April 11, 1995).

CERTIFICATE OF SERVICE

I, PJ Thiessen, a legal secretary with the law firm of Verner, Liipfert, Bernhard, McPherson & Hand, hereby certify that on this 23rd day of June, 1995, I placed in the mail via first class, postage prepaid, copies of the foregoing "Reply Comments of the Motion Picture Association of America, Inc." in IB Docket No. 95-41, to the following:

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